Chan Ting Hong v The Asia Insurance Co Ltd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R3-12-293 OF 1996
NIK HASHIM J
23 FEBRUARY 1998

Insurance *— Fire insurance — Liability of insurer — Charged property insured subject to vacant risk warranty and chargee clause — Breach of warranty — Insurer paid out to chargee — Whether insurer can claim sum paid out from insured who had breached warranty — Whether insurer ought not to have made payment after warranty breached — Effect of failure of chargee to notify insurer of change of risk after property rented out*

The appellant obtained a loan from Visia Finance Bhd ('Visia') to finance the purchase of a light industrial building ('the property'). In compliance with one of the terms of the loan, the appellant took out a fire insurance policy ('the policy'), subject to a vacant risk warranty and a chargee clause, from the respondent. Occupancy of any kind of the property was prohibited by the vacant risk warranty. The chargee clause provided, inter alia, that any loss payable to Visia 'shall not be invalidated by any act or neglect of the chargor (the appellant) ... or by any other increase of risk taking place in the property ... . Provided ... that the chargee (Visia) shall notify the company (the respondent) of any ... occupancy or increase of hazard which shall come to the knowledge of the said chargee ...'. Notwithstanding the vacant risk warranty, the appellant rented out the property and during the currency of the policy, the property was badly damaged by fire. The respondent paid out RM43,300 to Visia and RM1,765.50 to an insurance loss adjuster based on the provision of the chargee clause. Alleging a breach of the vacant risk warranty by the appellant, the respondent claimed a sum of RM45,065.50 together with interest and cost from the appellant. At the trial, the appellant testified, inter alia, that he had told Visia about the tenancy. The respondent, however, did not adduce any evidence to disprove the appellant's allegation. The sessions court allowed the claim after a full trial. On appeal the appellant argued that the vacant risk warranty was a condition precedent for liability and that the respondent ought not to have made any payment to Visia and the adjuster. It was contended that the appellant should not be made liable for the respondent's act in making payment.

Held, allowing the appeal:

(1) Observance and fulfilment of the vacant risk warranty was a condition precedent to any liability of the respondent to make payment under the policy. Since the condition precedent had been breached, the respondent was not liable under the policy to pay Visia and the adjuster at all and ought not to have made any payment (see p 527G–I).

(2) When effecting payment, the respondent had failed to consider the requirement of the provisos to the chargee clause which provided that the obligation to notify any change in the status of the property which came to the knowledge of Visia lay with Visia and not the appellant. The appellant's assertion that he had informed Visia of the tenancy was unchallenged. On the evidence it was Visia, not the appellant, which failed to furnish the correct information to the respondent (see pp 526H–I and 527A–B, I).

[Bahasa Malaysia summary

Perayu telah memperolehi suatu pinjaman daripada Visia Finance Bhd ('Visia') untuk membiayai belian sebuah bangunan perindustrian ringan ('harta tersebut'). Sebagai mematuhi salah satu daripada syarat pinjaman, perayu telah mengambil suatu polisi insurans kebakaran ('polisi tersebut'), tertakluk kepada waranti risiko kosong dan fasal pemegang gadaian, daripada penentang. Penghunian apa-apa jenis harta tersebut dilarang oleh waranti risiko kosong. Fasal pemegang gadaian memperuntukkan, antara lain, bahawa sebarang kerugian yang harus dibayar kepada Visia 'shall not be invalidated by any act or neglect of the chargor (the appellant) ... or by any other increase of risk taking place in the property ... . Provided ... that the chargee (Visia) shall notify the company (the respondent) of any ... occupancy or increase of hazard which shall come to the knowledge of the said chargee ...'. Tanpa mengira waranti risiko kosong, perayu telah menyewa harta tersebut dan semasa polisi tersebut berkuatkuasa, harta tersebut telah dirosakkan oleh kebakaran. Penentang telah membayar RM43,300 kepada Visia dan RM1,765.50 kepada penyelaras kerugian insurans berdasarkan peruntukan fasal pemegang gadaian. Dengan mengatakan kemungkiran waranti risiko kosong oleh perayu, penentang menuntut jumlah sebanyak RM45,065.50 bersama dengan faedah dan kos daripada perayu. Di perbicaraan, perayu memberi keterangan, antara lain, bahawa ia telah memberitahu Visia tentang penyewaan itu. Walau bagaimanapun, penentang tidak mengemukakan sebarang keterangan bagi membuktikan pengataan perayu adalah salah. Mahkamah sesyen membenarkan tuntutan selepas perbicaraan penuh. Atas rayuan, perayu menghujahkan bahawa waranti risiko kosong merupakan suatu syarat terdahulu untuk liabiliti dan bahawa penentang sepatutnya tidak membuat apa-apa bayaran kepada Visia dan penyelaras. Ia dihujahkan bahawa perayu tidak harus bertanggungjawab atas tindakan penentang dalam membuat bayaran.

Diputuskan, membenarkan rayuan:

(1) Pematuhan dan kepuasan waranti risiko kosong merupakan syarat terdahulu kepada apa-apa liabiliti penentang untuk membuat bayaran di bawah polisi tersebut. Oleh kerana syarat terdahulu telah dilanggar, penentang tidak bertanggungjawab di bawah

polisi tersebut untuk membayar Visia dan penyelaras sama sekali dan tidak patut membuat sebarang bayaran (lihat ms 527G–I).

(2) Ketika membuat bayaran, penentang telah gagal mempertimbangkan keperluan proviso kepada fasal pemegang gadaian yang memperuntukkan bahawa obligasi untuk memaklumkan apa-apa tukaran dalam taraf harta tersebut yang diketahui oleh Visia terletak dengan Visia dan bukannya perayu. Penegasan perayu bahawa ia telah memberitahu Visia tentang penyewaan itu tidak dicabar. Atas keterangan, Visia, bukannya perayu, telah gagal membekalkan maklumat yang betul kepada penentang (lihat ms 526H–I dan 527A–B, I).]

Notes

For cases on fire insurance generally, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 56–80.

Cases referred to

Foo Gee Yaw v Loo Koo Biow [1996] 5 MLJ 7 (refd)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)
Joel v Law Union and Crown Insurance Co [1908] 2 KB 863 (refd)

Appeal from: Summons No 52–9486 of 1992 (Sessions Court, Kuala Lumpur)

B Balendran (*YS Woo & Proctor*) for the appellant.
Robin Lim (*Azim Ong & Krishnan*) for the respondent.

Cur Adv Vult

Nik Hashim J: The appellant, on 26 February 1990, entered into a sale and purchase agreement with one Palm Grove Development Bhd to purchase a light industrial building for a purchase consideration of RM185,000. The appellant obtained a loan of RM148,000 from Visia Finance Bhd to settle the abovesaid purchase price. One of the conditions of the loan was that the appellant take out a fire insurance policy for the said property from the respondent. A fire insurance policy ('the policy') subject to a vacant risk warranty No 35 and chargee clause with an insured value of RM140,000 was issued by the respondent to the appellant on 6 April 1990. The appellant rented out the said property to a manufacturer of fast food boxes, Chii Tay Enterprise Sdn Bhd for a period of three years with effect from 1 October 1991. The said property was badly damaged by fire on 19 March 1992 during the currency of the policy. The respondent paid out RM43,300 to Visia Finance Bhd and RM1,765.50 to one insurance loss adjuster based on the provision of the mortgagee/chargee clause which says that the loss payable to Visia Finance Bhd shall not be invalidated by any act or neglect of the mortgagor/chargor (ie the appellant). Alleging a breach of warranty No 35 by the appellant, the respondent claimed a sum

of RM45,065.50 (RM43,300 + RM1,765.50) together with interest and cost from the appellant, the insured, which the learned sessions court judge allowed after a full trial. The trial judge held that there was a breach of warranty No 35 when the insured premises was rented out and further held that the said fact material for estimating risk was not communicated to the respondent.

It is the contention of En B Balendran, for the appellant, that warranty No 35 is a condition precedent for liability. Since the fulfilment of the warranty No 35 becomes a condition precedent, the respondent ought not to have made any payment to Visia Finance Bhd and the adjuster. By making payment under the policy, the respondent acted negligently and the appellant should not be made liable for the negligent act of the respondent.

Encik Robin Lim, for the respondent, urged the court not to interfere with the sessions court's decision as the judge had not misdirected herself in law or in fact and prayed that the appeal be dismissed with costs.

In order to resolve the above issue I consider it necessary to reproduce some of the relevant provisions of the policy.

The vacant risk warranty No 35 states:

> Warranted that at no time during the currency of this policy shall the premises described herein be used for the storage or deposit of goods of any kind or for any other purpose whatsoever ....

The policy provides on the first page (p 56 of the record):

> In consideration of the insured named in the Schedule hereto paying to the abovenamed company the premium mentioned in the said Schedule.
>
> The company agrees subject to the terms and conditions contained herein or endorsed hereon that if after payment of the premium the property insured described in the said Schedule ... be destroyed or damaged by fire ... the company will pay ... to the insured the value of the property insured ....
>
> Provided always that the due observance and fulfilment of the terms and conditions and endorsements of this policy insofar as they relate to anything to be done or complied with by the insured shall be conditions precedent to any liability of the company to make any payment under this policy.

The policy is also subject to the mortgagee/chargee clause which appears under endorsement/clauses/warranties and the clause reads as follows:

> (Mortgagee (chargee) clause)
>
> Loss, if any, payable to Visia Finance Bhd as mortgagee (chargee) ... shall not be invalidated by any act or neglect of the mortgagor (chargor) ... or by any other increase of risk taking place in the property insured hereunder ....
>
> Provided also that the mortgagee (chargee) shall notify the company of any ... occupancy or increase of hazard which shall come to the knowledge of the said mortgagee (chargee) and unless permitted by this policy it shall be noted thereon and the mortgagee (chargee) shall on demand pay the premium for such increased hazard for the term thereof otherwise this policy shall be null and void.

The schedule to the policy (p 58 of the record) provides that the insured property was stated to be subject to the mortgagee/chargee clause and warranty No 35. For the period of insurance from 30 September 1990 to 30 September 1991 the insured property was vacant. On the renewal certificate (p 55 of the record) for the period from 30 September 1991 to 30 September 1992 the insured property was described under the heading note 'Interest Insured' as 'on the vacant single-storied building ...'. The fire took place on 19 March 1992. It is not in dispute that the proposal (P1) for the fire insurance (at p 38 of the record) was prepared by Visia Finance Bhd, and not by the appellant. At the time when the policy was taken, the insured property was vacant. The renewal was also done by Visia Finance Bhd. The appellant (DW1) in his evidence under cross-examination by the respondent's counsel testified (at p 32 of the record, line E):

> Yes, I informed Visia Finance about the tenancy. I was not aware that I have to inform the plaintiff (respondent) of any changes. Yes, Visia Finance help me with the process that I have to pay.

In her grounds of judgment, the learned judge said at p 21 of the record:

> ... isu utama dalam kes ini siapakah yang patut dipersalahkan semasa mengisi borang proposal itu.

and she continued by asking herself at p 22 of the record, line E:

> ... fakta yang merupakan asas di dalam kes ini ialah 'adakah defendan (the appellant) memberi maklumat yang salah dalam borang cadangan'.

And at p 23 she concluded at line B:

> Saya juga tidak bersetuju dengan peguam defendan (appellant) bahawa oleh kerana borang cadangan telah diisikan oleh Visia Finance, defendan (appellant) tidak secara nyata memberi maklumat yang salah. Jika itu adalah benar, maka Visia Finance telah mengisi borang itu sebagai agen kepada defendan kerana defendan sendiri mengaku beliau meninggalkan semua urusan kepada Visia Finance. Ini menunjukkan bahawa defendan telah membenarkan Visia Finance bertindak baginya semua urusan insurance.

First and foremost, the issue of agency was not pleaded by the respondent in its statement of claim. As such, it is not the duty of the judge to make out a case for the respondent when the respondent did not even raise the point in its own pleading (see *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; *Foo Gee Yaw v Loo Koo Biow* [1996] 5 MLJ 7). Therefore, the judge's finding on the agency is bad in law and should be set aside.

With regard to the issue and question raised by the trial court as mentioned above, the judge did not answer them adequately in her judgment. In my view, the answer to the issue and question is important in this case as the obligation to notify any change in the status of the property which comes to the knowledge of the mortgagee lies with the mortgagee, ie Visia Finance Bhd and not on the mortgagor, ie the appellant (see mortgagee/chargee clause). According to the appellant, he told Visia Finance Bhd about the tenancy. Unfortunately, the learned trial judge did

not make any finding of fact whether she accepted or rejected the appellant's assertion. The respondent did not introduce any evidence to disprove the same. That being so, the appellant's evidence on the point stands unchallenged. Thus, Visia Finance Bhd could not claim no knowledge of the occupancy of the insured property. Morever, it was Visia Finance Bhd, which proposed and renewed the policy of the property, whereas the appellant merely made payment whenever being informed to do so. Accordingly therefore, it is the responsibility of Visia Finance Bhd as a mortgagee/chargee under the policy to ensure that the information it supplied to the insurer is true. It is trite law that insurers are entitled to full and correct disclosure of all the facts that are material to the risks (*Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863). The occupancy of the insured property is material to the risk. Any change in the status of the insured property is to be notified to the insurer. This, however, was not done in the present case. The notification of the change is consistent with the condition stipulated under cl 8(a) of the policy. Under the proviso to the mortgagee/chargee clause, the duty to notify of the occupancy lies with the mortgagee/chargee, ie Visia Finance Bhd, and not with the mortgagor ie the appellant, and if the mortgagee fails to do so, then the policy becomes null and void, as the term of the vacant risk warranty No 35, which is one of the endorsements in the schedule, prohibits occupancy of any kind. Its breach is therefore fatal to the claim under the policy. The policy at its first page (p 56 of the record) clearly states that due observance and fulfilment of the terms, conditions and endorsements of the policy shall be conditions precedent to any liability of the respondent to make any payment under the policy. The respondent had made a costly mistake when it paid Visia Finance Bhd based on the mistaken belief of its claim manager, PW1, when in his testimony at p 26 of the record, he said:

> It is mandatory that we make payment to the chargee regardless whether the insured has breached the term and condition.

Observance and fulfilment of the vacant risk warranty No 35 is a condition precedent to any liability to make payment under the policy. Since the condition precedent in the form of the endorsed warranty had been breached, it follows that the respondent was not liable under the policy to pay Visia Finance Bhd at all. It is obvious that the respondent, when effecting the payment, had not directed itself to the requirement of the provisos to the mortgagee/chargee clause. The provisos are part of the mortgagee/chargee clause and therefore, not only they must be read together with the rest of the clause but also they need to be complied with strictly. Their compliance is mandatory under the policy. With respect, I agree with counsel for the appellant that the respondent ought not to have made any payment to Visia Finance Bhd and the adjuster as it did. That being the case, the respondent's claim for the recovery of the sum paid to Visia Finance Bhd and the adjuster from the appellant for the breach of the vacant risk warranty No 35 is thus misconceived and unsustainable. On the evidence, it is Visia Finance Bhd and not the appellant, which failed to furnish the correct information to the respondent. To find otherwise would be perverse. Thus, I find that the judge's finding allowing the

respondent's claim is perverse and erroneous in law and thereby cannot be allowed to stand. In the event, I allow the appeal with costs and set aside the order of the judge accordingly.

Appeal allowed.

Reported by Kevin Ooi